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In the
Supreme Court of the United States
October Term, 1994

ERBEN A. HUNZIKER, DONALD M. FURMAN,
R. FRIEDRICH AND SONS, INC., and
BUCK CONSTRUCTION COMPANY, INC.,
Petitioners,

v.

STATE OF IOWA,
Respondent.

Petition for Writ of Certiorari
to the Supreme Court of Iowa

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

* JAMES S. BURLING
VICTOR J. WOLSKI
GREGORY W. MCCRACKEN
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae
Pacific Legal Foundation

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide, including donors from the State of Iowa. Policy for PLF is set by a Board of Trustees

composed of concerned citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

Attorneys for PLF have participated in numerous land use takings cases before this Court and other courts representing both amicus curiae and property owners. For example, PLF participated as amicus curiae in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992), and PLF attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).[1]

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of property

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[1] PLF has also participated as amicus curiae in other takings cases before this Court such as in *Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304 (1994); *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153 (1992); *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 447 U.S. 340 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621 (1981); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981); and *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

rights will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.3, written permission from all parties to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In 1976 and 1978, the Iowa Legislature enacted statutes governing significant findings of ancient human remains. Iowa Code §§ 305A.7, 305A.9, and 716.5. These statutes can dramatically impact the ability of property owners to make use of their land--although the existence of the impact may not have been apparent in 1976 or 1978--and, indeed, in most cases may not become apparent for many years hence. Under the decision in this case below, once the impact of the statutes is discovered, the current owner may have no legal recourse whatsoever for any relief.

The statutes enable Iowa's state archaeologist, after making a significant find of ancient human remains, to follow two possible courses of action. The state archaeologist may allow the disinterment of remains from the property on which they were discovered for their subsequent reinterment in a cemetery established specifically for that purpose, or the state archaeologist may refuse to allow reinterment of the remains elsewhere, in which case the state archaeologist could prohibit any use of the property on which significant human remains were discovered which would disturb them.

On May 1, 1990, the petitioners, Erben A. Hunziker, Donald M. Furman, R. Friedrich and Sons, Inc., and Buck Construction Company, Inc., who are land developers, sold to Dr. Jon Fleming a lot in a 59-acre tract of farmland which they platted for development. Dr. Fleming planned to build a home on the lot. In April, 1991, just before excavation

began on the home's basement, the state archaeologist learned that Dr. Fleming's lot had a Native American burial mound on it. The state archaeologist probed the lot and found some human bones. Later studies concluded that the burial mound was made between 1,000 and 2,500 years earlier by Native Americans of the Woodland Period, a significant find. Before the probes neither petitioners nor Dr. Fleming were aware of the burial mound. *Hunziker v. State of Iowa*, 519 N.W.2d 367, 368 (Iowa 1994).

Pursuant to the ancient human remains statutes, the state archaeologist prohibited disinterment of the burial mound and required the establishment of a 50-foot buffer zone around the 34-foot diameter burial mound. On April 30, 1991, Dr. Fleming received a letter from the state archaeologist warning him of the criminal penalties for disinterment of the remains. Because of the size of the lot and the situation of the burial mound with its surrounding buffer zone near the center of the lot, construction of a house on the lot was no longer feasible. Indeed, because of the ancient human remains statutes and the actions of the state archaeologist, the City of Ames refused to issue a building permit for the lot. *Id.*, Petition for Writ of Certiorari (Pet.) at 3.

Petitioners refunded Dr. Fleming his purchase price and architectural fees incurred for development of the lot. Dr. Fleming in turn quitclaimed all his interest in the lot to petitioners, including the right to sue for a taking. Petitioners then offered the state archaeologist to move the mound and its remains, at their expense, to a site in a wooded city park, but the state archaeologist refused the offer. The state archaeologist also refused to disinter the remains and reinter them in the special cemetery established for that purpose. Petitioners then brought a mandamus action in state court, alleging that the state's action was a

regulatory taking of private property without just compensation. They sought a writ of mandamus commanding the state to condemn the lot and pay them just compensation for it. Both petitioners, plaintiffs below, and defendant moved for summary judgment, which the trial court granted the latter and denied the former. 519 N.W.2d at 368, Pet. at 3-4.

Petitioners appealed to the Iowa Supreme Court, which affirmed the trial court on a vote of four to one.[2] 519 N.W.2d at 371. The majority opinion cited *Lucas v. South Carolina Coastal Commission*, 120 L. Ed. 2d 798, as authority to deny petitioners compensation because their lot was purchased after the enactment of the ancient human remains statutes, which the court deemed part of the property law affecting title to all land in the state containing significant human remains by forbidding its development. 519 N.W.2d at 370-71. Under the court's reasoning, because both the statutes and the burial mound were in place before petitioners purchased the lot, the right to develop the lot was not one of their property interests, so they could not receive compensation for it. *Id.* at 371. The dissenting opinion also relied on *Lucas* but concluded that *Lucas* supported petitioners' claim. *Id. at* 372-73. The dissent reasoned that the mere passage of the ancient human remains statutes did not effect a taking. Rather, a regulatory taking occurred when the government applied the statutes to the lot in a manner that precluded all economically viable use of it. *Id.* at 373. The dissent also noted that Iowa Code § 305A.9, "giving the state archaeologist authority to deny permission to disinter human remains, is not a self-executing statute creating a covenant running with the land."

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[2] *Hunziker v. State of Iowa*, 519 N.W.2d 367.

There is no dispute in this case that all economically viable use of the property in question has been destroyed. The dispute is whether petitioners should be precluded from obtaining just compensation for the taking.

SUMMARY OF ARGUMENT

The denial of all economically beneficial use of property by a law or regulation is a categorical taking, and the Just Compensation Clause of the United States Constitution requires that states pay compensation when this occurs. The only exception, under *Lucas*, is when the restriction on use can be rationalized as an extension of pre-existing common law principles of property and nuisance. Presented with a categorical taking of petitioners' property, the Supreme Court of Iowa failed to analyze the responsible statutes in light of common law principles. Instead, the court held that the mere passage of the statutes--even though the statutes were not determined to have any effect on the property until more than a decade later--creates an exception to takings liability when the property was purchased after the statutes had passed. This holding conflicts with *Lucas*, violates the Just Compensation Clause, and effectively abolishes the right of subsequent purchasers to bring as-applied takings challenges to laws requiring government permission (such as variances, special use, or building permits) prior to the use of land.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

THE SUPREME COURT OF IOWA IGNORED THE BACKGROUND PRINCIPLES OF IOWA'S COMMON LAW OF PROPERTY AND NUISANCE, IN VIOLATION OF THIS COURT'S REQUIREMENT

This case is an extreme example of the very situation this Court attempted to preclude by the decision in *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d at 821-22. Even though it is not disputed that all economically viable use of petitioners' property has been eliminated by application of the ancient human remains statutes, *see Hunziker*, 519 N.W.2d 370-71, the Supreme Court of Iowa excuses the state from a *per se* category of takings liability, solely on the basis that the state passed a law under its police powers. *Id.*

Lucas makes clear that the Just Compensation Clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment, requires that compensation be paid to property owners who suffer a loss of economically beneficial or productive use of their property, *unless their use of the land could have been enjoined in the courts as a private or public nuisance.*[3] The only laws passed by a state

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[3] This Court left open the possibility that other common law principles could be enlisted to avoid payment of compensation, primarily "to forestall ... grave threats to the lives and property of others." *Lucas*, 120 L. Ed. 2d at 821 n.16

(continued...)

that can deprive private citizens of all economic use of their property without payment of just compensation are laws that can be justified under the common law nuisance and property principles of that state, as it is "open to the State at any point to make the implication of those background principles of nuisance and property law explicit." *Lucas*, 120 L. Ed. 2d at 822.

This Court's use of common law principles as an external, objective yardstick with which to assess a state's liability was no accident. *See Lucas*, 120 L. Ed. 2d at 823 n.18. *Lucas* stressed the "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm" when such an extreme prohibition on private use is in force. 120 L. Ed. 2d at 814. This Court found such a limitation to be an "extraordinary circumstance" in which

> it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," ... in a manner that secures an "average reciprocity of advantage" to everyone concerned.

Lucas, 120 L. Ed. 2d at 814 (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

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[3] (...continued)
(citations omitted). Obviously, more than a police power justification is required and recourse must be had to *preexisting* principles.

In the "extraordinary circumstance" of deprivation of all economically beneficial use, the self-interested determinations of a legislature cannot be controlling. Common law principles concerning property ownership and use, developed in the neutral, disinterested courts by private party adversaries, are a reliable safeguard against public confiscation of private property rights.[4] The state may make explicit the implications of these principles, but cannot legislatively alter these "background principles" that inhere in the title to property. *See Lucas*, 120 L. Ed. 2d at 821-22. State courts must analyze legislative enactments to ensure that they "do no more than duplicate the result that could be achieved in the courts," *id.*, else these courts are failing in their duty to prevent "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Supreme Court of Iowa deviated from this responsibility in a manner that, if allowed to stand, gives all state courts the means to render *Lucas* a nullity. Rather than determining whether the ancient human remains statutes can be considered an extension of preexisting, common law principles, the court in *Hunziker* instead proclaimed that, once enacted, these statutes *are* the background principles. 519 N.W.2d at 371. Thus, everyone who purchases land after the enactment of a regulation that *could possibly* be applied to their property is buying much less than "an estate

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[4] The only time the state can "inhere" limitations in the title to land itself must be when the land first enters the private domain. If the state places a covenant, condition, or restriction on the use of land before selling it to private parties, it has already in a sense "paid" for this limitation by accepting a lower purchase price on account of the limitation.

with a rich tradition of protection at common law." *Lucas*, 120 L. Ed. 2d at 814 n.7. They instead are purchasing title to land with a serious latent defect that can render the property worthless. If other courts follow the *Hunziker* decision, then there is no preventing the eventual elimination of the *per se* category of complete deprivation of economic use of property. Under *Hunziker*, all a state need do is pass a law authorizing localities to adopt property regulation that precludes all use of private property and then wait for the current generation of property owners to pass away. Inhering in the title would be the possibility that all use of land can be prohibited. Surely, *Lucas* envisions greater protection for property rights than this.

II

THE SUPREME COURT OF IOWA'S DECISION WOULD EFFECTIVELY ELIMINATE THE ABILITY OF A LARGE CATEGORY OF PROPERTY OWNERS TO SECURE COMPENSATION FOR PER SE TAKINGS OF THEIR LAND

The *Hunziker* court failed to address the question of what happens to the property rights of the previous owners of petitioners' land. This is a failing of profound consequence, for the ability to transfer--along with the land itself--the right to challenge the application of land use laws, is crucial to the enforcement of property rights. As this Court recognized in *Nollan v. California Coastal Commission*, 483 U.S. at 833 n.2:

> Nor are the [buyers'] rights altered because they acquired the land well after the [government] had begun to implement its policy. So long as the [government] could not have deprived the prior owners of the [property interest] without

> compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

The Supreme Court of Iowa held that prohibitions on use run with the land, *Hunziker*, 519 N.W.2d at 371, but assumed without analysis that the right to challenge these prohibitions does not. This places property rights in peril, particularly under the circumstances of this case. Unlike a zoning regulation that is geographically defined, there is no telling whether the ancient human remains statutes will apply to one's property. As ancient bones could be found buried in any cubic inch of one's land, it is practically impossible to determine with certainty whether the statute applies, until one discovers that it does.

Thus, a facial challenge based on economic impact, which requires a showing that the challenged laws will necessarily deny beneficial or productive use, cannot be prosecuted since there exists the possibility that the law will not apply. *Cf. Agins v. City of Tiburon*, 447 U.S. at 262 (facial challenge rejected because property owners "may be permitted to build" on land). But if subsequent purchasers acquire land in which the potential "limitation or restriction on the use of the land inhered in the [purchasers'] title," *Hunziker*, 519 N.W.2d at 371, then the right to bring a challenge to the laws as applied to that parcel of land vanishes into thin air.

If there is no right to transfer the ability to challenge land use regulations along with the subject property, then the whole impact of the risk posed by the regulations will fall on the seller. The owner at the time the regulations are enacted will have to sell the property at a lower price--with the lower price reflecting a "discount" for the probability that the regulations will apply and the potential impact of the

regulations if they were to apply. This discount might be large, but of necessity will not reduce the price down to the level that will support a facial challenge, namely, a net of zero. The buyer is gambling that all economic value will not be deprived by application of the regulations; the seller always loses the amount of the discount caused by the existence of the potentially applicable regulations. And the state becomes insulated from the liability to compensate private property owners for the taking of all economic value of their land.

Under the *Hunziker* approach, only owners of property who possess the means to develop it prior to sale will be in a position to challenge regulations enacted during the pendency of their ownership. Given the wide sweep of potential jurisdiction, it is doubtful the state archaeologist can give a final determination until development plans are far along and the ripeness of an as-applied challenge hinges on this determination. *See Williamson County*, 473 U.S. at 186-90. Professional, commercial land developers could still, in some occasions, protect their rights. Most individuals, such as a retired couple selling all or part of their farmland for a nest egg, cannot and will have to accept a reduced "discounted" price caused by a cloud on their title due to the potential impact of the regulations on their property. The sum of these discounts will equal the value of the land withdrawn from private use by the state, which avoids paying just compensation.

The Iowa Supreme Court has, for most individuals, eliminated the right to bring an as-applied takings challenge--when a categorical taking normally would have been found. Such a result violates the United States Constitution, regardless of the branch of government that is to blame. *See Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) ("a State cannot be permitted to

defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all").

CONCLUSION

In failing to determine if the ancient human remains statutes were an extension of the preexisting common law principles of property and nuisance, the Supreme Court of Iowa has violated the express requirements set forth by this Court in *Lucas v. South Carolina Coastal Council*. Rather than judge the enactments in light of the common law yardstick, the court made these enactments the yardstick itself. This decision removed the *Lucas* safeguards against a state's taking of property without payment of just compensation. Further, it ignored the important issue whether owners can transfer their full property rights, including the right to challenge land use regulations, in conflict with this Court's decision in *Nollan v. California Coastal Commission*.

To resolve these conflicts and to reaffirm the fundamental rights of Iowa property owners, Pacific Legal Foundation respectfully submits that this Court should grant the petition for writ of certiorari.

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Respectfully submitted,

* JAMES S. BURLING
VICTOR J. WOLSKI
GREGORY W. MCCRACKEN
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae
Pacific Legal Foundation